

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

Criminal No. 03-235(1) (JNE)
ORDER

Richard Mose McElrath,

Defendant.

By order dated December 14, 2010, the Court denied Defendant's motion for a new trial because it was an unauthorized successive petition for habeas corpus relief. On December 27, 2010, Defendant filed both a notice of appeal, dated December 21, and a "Rule 60(b) Motion for Newly Discovered Evidence and Motion to [Rescind] Notice of Appeal and to Have its Content Titled Under Supplement to Today's Motion—Motion for a New Trial," dated December 22. Since then, Defendant has filed a supplemental motion to his Rule 60(b) motion as well as a "motion to suspend" his Rule 60(b) motion, which included a "motion to withdraw (all) of [his] Rule 60-B (motions)."

The Court construes Defendant's December 22 motion to rescind his notice of appeal as a motion for voluntary dismissal pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure. Defendant's appeal has not yet been docketed by the circuit clerk and the Court therefore dismisses the appeal on Defendant's motion. *See* Fed. R. App. P. 42(a); *see also* 8th Cir. R. 42A. The Court also grants Defendant's motion to withdraw his Rule 60(b) motion.¹

¹ The Court notes that under 28 U.S.C. § 2255(h), a second or successive § 2255 motion may not be entertained by a district court unless the defendant has obtained approval from the court of appeals. 28 U.S.C. § 2255(h) (2006). The Eighth Circuit has repeatedly held that a defendant may not avoid this restriction by couching a second or successive motion as a Rule 60(b) motion. *See, e.g., Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002). The requirements for obtaining certification from the court of appeals are given in 28 U.S.C. § 2255(h)(1) and (2).

Based on the files, records, and proceedings herein, and for the reasons stated above, IT
IS ORDERED THAT:

1. Defendant's motion to rescind his notice of appeal [Docket No. 233] is GRANTED and his appeal is DISMISSED.
2. Defendant's motion to withdraw his Rule 60(b) motion [Docket No. 237] is GRANTED.
3. Defendant's motion for a new trial pursuant to Rule 60(b) [Docket No. 232] is DENIED AS MOOT.
4. Defendant's motion to supplement his Rule 60(b) motion [Docket No. 236] is DENIED AS MOOT.

Dated: January 12, 2011

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge